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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1196~~ 92

EDGAR D. WHITCOMB, GOVERNOR
APPELLANT

v.

PATRICK CHAVIS, ET AL.

On Appeal from the United States District Court for the Southern District of Indiana

BRIEF OF THE STATE OF ILLINOIS JOINED BY THE STATES OF ALABAMA, ALASKA, ARIZONA, COLORADO, IOWA, MISSISSIPPI, MONTANA, SOUTH DAKOTA, TEXAS, UTAH AND WEST VIRGINIA, AS *AMICI CURIAE*

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OPINIONS BELOW

The July 28, 1969, opinion of the district court is reported at 305 F. Supp. 1364. The December 15, 1969, opinion of the district court is reported at 307 F. Supp. 1362.

JURISDICTION

On July 28, 1969, the three-judge district court issued an order and opinion declaring unconstitutional the multi-member districting provisions of the legislative apportionment statutes of Indiana relating to Marion County. On December 15, the district court issued an order expressly enjoining the state election officials from conducting any elections under the apportionment acts declared unconstitutional and mandating the state election officials to conduct the 1970 elections in accordance with a plan drawn by the Court. On February 18, 1970, the State docketed its appeal with this Court, and on March 23, 1970, probable jurisdiction was noted. This Court's jurisdiction rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

The amicus curiae will discuss the following questions.

1. Does a multi-member districting scheme contravene the equal protection clause merely on the grounds that a cognizable racial-socio-economic group has not, as the lower court found, elected a proportionate share of representatives?

2. In the absence of a demonstrated invidious discrimination, is the multi-member district versus the single-member district problem a non-justiciable political question?

3. Does the equal protection clause require, or does it even permit, legislative district lines to be drawn to protect cognizable racial-socio-economic groups against dilution of their voting strength?

INTEREST OF THE AMICUS CURIAE

This Brief Amicus Curiae, presented for the State of Illinois, is sponsored by William J. Scott, its Attorney

General, and joined by other states having an interest in the outcome of this case.

Illinois, a populous state, has a large state legislature composed of representatives elected from a combination of single-member and multi-member districts. A recent study indicates that Illinois and Indiana are a part of a group of some thirty-eight states which make some use of multi-member districts in electing representatives to their respective state legislatures—thirty-eight houses of representatives and eighteen state senates. Furthermore, at-large districts are commonly used at the local governmental level in most states.

The interest of Illinois, and other similarly situated states, is immediate and direct. This Court's decision will directly affect the constitutionality of state and local districting plans in force in Illinois, as in similarly situated states. For recent reapportionment litigation affecting the State of Illinois, see *Skolnick* v. *State Electoral Board*, 307 F. Supp. 691 (N.D. Ill. 1969), state legislative redistricting; *Skolnick* v. *State Electoral Board*, 307 F. Supp. 698 (N.D. Ill. 1969), congressional redistricting.

STATEMENT

This is action for declaratory and injunctive relief brought by Negro residents of Marion County, Indiana, alleging that the multi-member districting scheme for electing that county's representatives to the state legislature violates the equal protection clause of the federal Constitution. Several other plaintiffs joined in the suit representing such groups as Negroes in Lake County, Indiana, and Republican suburbanites in Marion County. Relief was denied these latter groups on various grounds, generally because of failure of proof of their claims or lack of standing.

On July 28, 1969, the Three-Judge District Court filed an opinion and order declaring the multi-member scheme of Marion County unconstitutional and giving the State until October 1, 1969, to redistrict and reapportion the State consistent with the district court's Opinion. On December 15, 1969, the Court, noting the failure of the state legislature to reapportion itself as ordered by the Court, itself reapportioned the Indiana legislature.

In its July 28 Opinion the District Court noted that Marion County residents had been allocated 15 of 100 state representative seats and 8 of 50 state senate seats, the largest number of seats held by any county in Indiana. The Court also noted that there was no subdistricting within the multi-member district and that all candidates ran on an at-large basis. The cornerstone of the District Court's decision is its determination that a cognizable racial-socio-economic minority resides in part of Marion County's Center Township. First the Court identified the geographic boundaries of this area which it termed the "Center Township Ghetto"—a low per capita income, substandard housing, low-education neighborhood inhabited mainly by Negroes. It employed selected demographic, economic and social statistics from the 1960 census and other sources to aid in delineating this Ghetto area. The Court found that this Ghetto area had an interest in such areas of substantive law as housing regulations, welfare programs, garnishment statutes and unemployment compensation which diverged significantly from the interests of non-residents of the Ghetto. Then the District Court compared the number and percentage (relative to population) of elected legislators who resided within the Ghetto with the number and percentage of elected legislators who resided in other areas of the Marion County multi-member district. The Court found that a lower percentage of legislators relative to

population residing in the Ghetto had been elected from 1960 to 1968. The Court also found that a disproportionately higher percentage of legislators were elected from a higher-income, predominantly white area, Washington Township, over the same period as well as that a much more disproportionate percentage were elected from a middle-income Negro area in Washington Township.

According to the Court, the evidence indicated that the two dominant political parties had strong organizations which controlled nomination of the respective parties' slates; that straight ticket voting is common and one party or the other tends to sweep all legislative seats in a given election; and that legislators are reluctant to buck the consensus of their party's delegation and that this reluctance has developed because of the common constituency of the legislators and because of the strength of the county party organizations in controlling nominations.

There was no finding by the Court of any purposeful design or plan by state officials to frustrate the voting rights of Negroes or Ghetto residents. Nor, for that matter, was there a finding that the voting rights of the Negro Ghetto residents were in fact frustrated in the state legislature. Nevertheless, in light of the lack of control shown over nomination of legislators and because the system allegedly resulted in a legislative delegation in which no one was primarily responsible to ghetto residents, the Court concluded that the multi-member voting system was constitutionally defective in that it minimized the voting strength of Center Township Ghetto residents.

The Court gave the legislature to October 1, 1969, to reapportion the legislature. When the legislature failed to do so, the Court ordered the plaintiffs, intervening defendants and other interested parties to submit reapportionment

plans. Only two were found numerically close enough to the "one-person, one-vote" standard to satisfy the Court, and one of these was rejected because it did not protect "the legally cognizable racial minority group against dilution of its voting strength." (A. 395). The December 15, 1969, Order of the District Court which reapportioned the State pursuant to the Court's plan was subsequently stayed by this Court, pending its decision on the appeal filed by the State of Indiana from the District Court's decisions.

ARGUMENT

INTRODUCTION AND SUMMARY

The District Court's conclusion that the multi-member legislative districts in Marion County contravene the equal protection clause is not based on any finding that the intended purpose of the Indiana legislative apportionment statute establishing the multi-member districts was to discriminate against a racial or political minority; nor was there any finding that the effect of the multi-member districts was to preclude Negroes or Republicans or Democrats from being elected. In fact the evidence showed that both blacks and whites, Republicans and Democrats, have been elected from the multi-member districts in Marion County.

Instead, the Court based its conclusion of constitutional invalidity on the fact that a defined racial-socio-economic group had not elected a proportionate share of legislators who resided within their neighborhood and that, further, the multi-member districting plan did not protect them against a supposed dilution of their voting strength. The Court also based its decision on the alleged influence of party organizations over nominations and over the actions of legislators once elected as well as on the alleged unre-

sponsiveness of various legislators who are elected at-large to various special interest groups within their constituency. Furthermore, the district court made the implicit assumptions that programs appealing to a racially based special interest group have a better chance of success with single-member districts and that a legislator must be a resident of a specific area and member of a special interest group in order to effectively represent it.

The reasoning as well as the conclusions of the district court are clearly without merit and are directly in conflict with the pronouncements of this Court on the requirements of the equal protection clause. In a series of decisions dating back to *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Lucas* v. *Colorado*, 377 U.S. 713 (1964), this Court has made it clear that multi-member districts are not *per se* unconstitutional and may appropriately be used so long as they comply with the one-man, one-vote rule of *Baker* v. *Carr*, 369 U.S. 196 (1962). And that a multi-member districting scheme is open to a constitutional challenge as an "invidious discrimination" only on a showing that the scheme was designated to or would operate to minimize or cancel out the voting strength of racial or political elements of the population. *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965).

Inasmuch as the instant case contains no finding of a design or effect of cancelling out or minimizing the voting strength of Negroes or Republicans or Democrats, the multi-member districts in Marion County do not constitute an invidious discrimination barred by the equal protection clause. The evidence in the instant case indicated only that middle-class Negroes had proportionately more legislators resident in their neighborhood, and lower-income Negroes proportionately less resident in their neighborhood, than would be expected from their percentage composition of

the total population of Marion County. But this Court has never adopted the extreme theory that a special interest group has a constitutional right to proportional representation in government of its special interests.

Moreover, in the absence of a demonstrated invidious discrimination, the multi-member versus single-member districting problem is a nonjusticiable political question within the criteria set out in *Baker* v. *Carr*, 369 U.S. 196, 217 (1962). However, the district court proceeded in the face of this well established doctrine and its July 28, 1969, Opinion is replete with conscious choices between competing policy and philosophical considerations. The philosophical and policy-based decision of choosing between the single-member and multi-member district is clearly one for the citizens of a state and its duly elected representatives, not a federal district court.

And, contrary to the assertion of the district court that legislative district lines should be drawn to maximize the voting strength of identifiable racial-socio-economic groups, the equal protection clause does not require, nor does it permit, the use of racial considerations in drawing district lines. The equal protection clause does not demand an alignment of districts for a state legislature to assure success at the polls of any race (*Mann* v. *Davis*, 245 F. Supp. 241 (E.D. Va. 1965) aff'd *sub. nom.*, *Burnette* v. *Davis*, 382 U.S. 42), and a legislature which drew district lines with respect to preferring a race or color would be subject to attack for violating the Fourteenth Amendment. *Wright* v. *Rockefeller*, 211 F. Supp. 460 (S.D. N.Y. 1962), aff'd 376 U.S. 52; *Sims* v. *Baggett*, 247 F. Supp. 96, 108-109 (M.D. Ala. 1965). To use the equal protection clause in the manner suggested by the district court is to introduce the very distinctions between citizens that it so soundly condemns.

I. A MULTI-MEMBER DISTRICTING SCHEME DOES NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE MERELY BECAUSE A COGNIZABLE RACIAL-SOCIO-ECONOMIC GROUP HAS NOT ELECTED A PROPORTIONATE SHARE OF REPRESENTATIVES.

The District Court substantially premised its holding that the Marion County multi-member districts contravened the equal protection clause on the fact that a defined racial-socio-economic group—the residents of the Center Township Ghetto—had not elected a proportionate share of legislators who resided within the Ghetto. We submit that this premise is patently inconsistent with the requirements of the equal protection clause as enunciated by this Court in reapportionment cases over the past decade and cannot serve as the basis for invalidating the multi-member districts in Marion County. We submit further that this Court has never adopted the theory that a special interest group has a constitutional right to proportional representation of its special interests in the government.

Following the *Baker* v. *Carr*[1] decision in 1962, this Court has been repeatedly called upon to elaborate on the ramifications of the *Baker* decision and to pass on the possible application of the equal protection clause to other apportionment problems involving either state or local government. The first real references to the single-member district versus multi-member district problem came in the 1964 companion cases of *Reynolds* v. *Sims*[2] and *Lucas* v. *Colorado*.[3]

In *Lucas* this Court discussed some of the practical problems in a system of election where a number of senators

[1] 369 U.S. 196 (1962).
[2] 377 U.S. 533 (1964).
[3] 337 U.S. 713 (1964).

and representatives are elected on an at-large basis in a district. This Court, however, made it clear that it was not intimating that an at-large election of a number of legislators from a county or any political subdivision, was constitutionally defective.[4]

In *Reynolds* v. *Sims*, this Court gave rather explicit approval to multi-member districts:

> Simply because the controlling criterion for apportioning representation is required to be the same in both house does not mean that there can be no differences in the composition and complexion of the two bodies * * * One body could be composed of single-member districts while the other could have at least some multi-member districts. (337 at 577)

And:

> A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen of the State. (377 at 578, 579)

And in discussing permissible deviations from one-man, one-vote this Court noted:

> Citizens, not history or economic interest, cast votes. * * * A consideration that appears to be of more sub-

[4] 377 U.S. at 731, footnote 21.

> stance in justifying some deviations from population-based representation in state legislature is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. (377 at 580, 581)

The first real challenge before this Court to multi-member district on equal protection grounds was *Fortson* v. *Dorsey*.[5] In this case the plaintiffs challenged a multi-member district for Fulton County (Atlanta), Georgia, where State Senators had to be residents of the subdistrict they represented although they were elected on an at-large, county-wide basis. In reversing the district court, this Court held that the equal protection clause does not necessarily require formation of all single-member districts in a state's apportionment scheme. Then this Court went on to deliver the much referred to statement that:

> It might well be that, designedly or otherwise, a multiple-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still

[5] 379 U.S. 433 (1965).

> passes constitutional muster. This question, however, is not in the record before us. (379 U.S. at 439)

In *Burns* v. *Richardson*,[6] this Court again found that insufficient proof had been presented to strike down the Hawaiian multi-member districting scheme on equal protection grounds. This Court held essentially that the use of multi-member districts was open to a constitutional challenge as an "invidious discrimination" *only* on a showing that the plan was designed to or would operate to minimize or cancel out the voting strength of racial or political groups. This Court did provide some dicta which the District Court in the instant case relies heavily on for support. It stated:

> It may be that this invidious effect can be more easily shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislation rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. (384 U.S. at 88)[7]

During this same period this Court had before it several other cases in which multi-member districting was present.

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[6] 384 U.S. 73 (1966).

[7] It should be noted that this statement does not represent, as the District Court would seem to infer, a deliniation of the crucial factors in showing a particular scheme perpetrates an invidious discrimination; rather it appears to be a direct response to points raised in the Brief of John Burns, Governor of Hawaii, in the *Burns* case. That Brief noted that 12% of one house came from one multi-member district, that there was no subdistricting as was present in *Fortson*, and that both houses were apportioned using multi-member districts (see pages 80-85 of the Burns Brief). Thus this Court may well have just been saying that these factors "may be used" in trying to show the discrimination, not that their presence constitutes a prima facie case of invidious discrimination.

In *Kilgarlin* v. *Martin*, 252 F. Supp. 404 (S.D. Texas 1966), the plaintiffs objected to multi-member state legislative districts which existed in four of the most populous Texas counties on the grounds that they allegedly minimized the voting effectiveness of Negroes and other minority groups. Plaintiffs introduced evidence which tended to show that the multi-member districts in Dallas County had resulted in the total exclusion of Negro candidates from office in this century even though there were enough Negroes to create one predominately Negro single-member district. Evidence was also adduced to show that other minority groups were submerged in the multi-member districts. The district court rejected these claims and gave the non-Negro minorities rather short shrift, pointing out that *Reynolds* v. *Sims*, 377 U.S. 533 (1964), holds that voting is a personal, not group, right, protects no political party or factions right to representation, and states that the "[l]egislature represents people, not trees or acres . . . farms or cities or economic interest." See 252 F. Supp. at 432-433 citing 377 U.S. at 561-62, 579-90. The district court dealt separately with the Negroes' claims but treated them as one of racial gerrymandering which requires clear evidence as to racial purposes. See 252 F. Supp. at 434-437. The district court found that the multi-member districts did not violate the equal protection clause. This Court affirmed that plaintiffs had failed in their proof of political and racial gerrymandering but did reverse and remand the case on the question of impermissible population variances between districts, *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967).[8]

[8] This Court also affirmed without opinion at least three other cases: *Yancy* v. *Faubus*, 251 F. Supp. 948 (E.D. Ark. 1965) aff'd (*Crawford County Bar Ass'n* v. *Faubus*) 383 U.S. 271 (a districting scheme is not unconstitutional just because it utilizes multi-member districts); *Schaefer* v. *Thompson*, 251 F. Supp. 450 (D. Wyoming 1965) aff'd (*Harrison* v. *Schaefer*) 383 U.S. 269 (do not have to subdistrict multi-member districts); *Mann* v. *Davis*, 245 F. Supp. 241 (E.D. Va. 1965) aff'd (*Burnette*

Read together these cases show recognition on the part of this Court that the multi-member versus single-member district problem, unlike the voter equality problem of the one-man, one-vote cases, is essentially a political decision within the purview of the states and not an equal protection problem under the 14th Amendment. As we demonstrate later in the brief, this position as to the political nature of the question is well taken; at the same time we can understand why this Court might want to leave the door open for a challenge to a districting scheme that perpetrated a particularity "invidious discrimination." However, this Court appears to be reluctant and correctly so, to apply the equal protection clause in the absence of a situation somewhat like *Gomillion* v. *Lightfoot*[9] where an effort to actually deprive individuals of their voting rights is readily apparent from the circumstances, whether it can be proven as such or must be inferred.

A number of the equal protection challenges to multi-member districts have involved allegations and/or findings of conscious purpose on the part of state officials to submerge minority voting strength through the creation of multi-member districts. Thus in *Mann* v. *Davis*, 245 F. Supp. 241 (E.D. Va., 1965) aff'd (*Burnette* v. *Davis*), 382 U.S. 42, it was alleged that the multi-member district near Richmond was established specifically in response to rising

v. *Davis*), 382 U.S. 42 (multi-member districts are permissible and it is not permissible to draw lines to assure the success of any race at the polls). And in *Drew* v. *Scranton*, 229 F. Supp. 310 (M.D. Pa. 1964), the District Court held unconstitutional a districting scheme that included both multi-member and single-member districts on the grounds that the residents of single-member districts were discriminated against. This Court vacated the decision and remanded it, which in effect gave the state legislature more time to reapportion. 379 U.S. 40. The District Court's decision in *Drew* would mean that multi-member districts are *per se* unconstitutional. Such a holding is clearly inconsistent with the holdings of this Court in *Fortson* v. *Dorsey, supra; Burns* v. *Richardson, supra; Mann* v. *Davis, supra;* and *Yancy* v. *Faubus, supra.*

[9] 364 U.S. 339 (1960).

Negro and Republican voting strength.[10] In *United States* v. *Democratic Executive Committee of Barbour County*, 288 F. Supp. 943 (M.D. Ala. 1968), a state change from beat to at-large election of local officials in the face of rising Negro voting registration in certain beats was held to be a purposeful denial of Fifteenth Amendment rights. And in *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965), the court found that multi-member districts were created for the purpose of preventing the election of Negroes to the legislature, the districts having been created by combining majority white and majority black counties in multi-member districts.

But there are no such allegations or findings in the instant case. In fact plaintiff Chavis, himself a Negro legislator, was a member of the legislature and supported the enactment of the present multi-member districts for Marion County.[11] The absence of any such purpose of submerging minority voting power, either express or implied from the facts of the case, should in and of itself furnish ample grounds for this Court to reverse the District Court and to uphold the Marion County multi-member districts.

Moreover, in the instant case there was not even a showing of non-purposeful "invidious discrimination."[12] Instead

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[10] See pages 8-17 of Appellant's (Burnette's) Jurisdictional Statement to the Supreme Court filed in *Burnette* v. *Davis*.

[11] See Transcript of Proceedings, pp. 101, 103 (Cross-Examination of Patrick Chavis).

[12] Both Republicans and Democrats, Negroes and whites, have been elected as senators and representatives over the past ten years. Moreover, while the plaintiffs were showing that there were proportionately less elected representatives who lived in the Center Township Ghetto, their figures showed that Census Tract 220—a predominantly middle-class Negro area—had about 10 times the number of elected representatives residing within it than would be true if it had a proportionate share of representatives. See tables 7, 8—305 F. Supp. 1364 at 1833, 1384. Thus, the plaintiffs are complaining, not about the absence of Negroes in the legislature, but rather about a non-proportionate number of poorer, less-well educated Negroes.

the evidence was directed at showing that within a given area of Marion County there exists what might be described as a special interest group of relatively poor, low-education, Negro citizens and that in the past decade this area has had proportionally less legislators resident in it than has been true of other defined areas of the county. It is most difficult to see how this constituted a denial of equal protection of the laws. There is no right to have a representative of any given special interest group; there is no right to have a representative living in one's immediate neighborhood.

The Court has never adopted the extreme theory that a special interest group has a constitutional right to proportional representation in government of its special interests. Compare this Court's refusal to allow population variances "in order to create districts with special interest orientation. . . ." *Kirkpatrick* v. *Preisler*, 394 U.S. 526 at 533; *Reynolds* v. *Sims*, 377 U.S. 533 at 561-562. Compare also *Hoyt* v. *Florida*, 368 U.S. 57, 69: "In the administration of the jury laws proportionate class representation is not a constitutionally required factor."[13]

The instant case involves no more than plaintiffs saying, in effect, that we think we would have a better chance to elect someone of our special interest group if we had single-member districts—thus we have been denied equal protection. This contention is clearly without merit and should be no more availing than those who seek court approval for a different set of district lines they feel would be more advantagous to their political interests. See *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), aff'g 211 F. Supp. 460.

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[13] See also, *Clay* v. *United States*, 397 F.2d 901, 912 (5th Cir. 1968), rehearing denied en banc, vacated and remanded on other grounds *sub. nom. Giordano* v. *United States*, 394 U.S. 310 (". . . nothing in the Constitution or the Universal Training and Selective Service Act requires racially proportionate selective service boards.").

Consequently, the District Court should be reversed on precisely the same grounds on which the *Burns* and *Fortson* cases were decided—*i.e.* failure to show any invidious discrimination connected with this particular multi-member districting scheme.

II. IN THE ABSENCE OF A DEMONSTRATED INVIDIOUS DISCRIMINATION, THE MULTI-MEMBER VERSUS SINGLE-MEMBER DISTRICTING PROBLEM IS A NON-JUSTICIABLE POLITICAL QUESTION.

An examination of the complaint, the evidence offered at the trial, and the District Court's opinions makes it clear that the District Court's decision involves a federal court making clearly political choices between competing political alternatives and philosophies. This is precisely the type of problem that the courts have traditionally and wisely avoided dealing with as being inappropriate for judicial determination. Not only are these problems appropriate for legislative, as opposed to judicial, determination but they also are state, as opposed to federal, political questions. In the absence of a clearly demonstrated contravention of the Constitution, federal courts cannot properly be concerned with them.

In *Baker* v. *Carr*, this Court set down criteria for determining whether a question presented to the Court was a non-justiciable political question; one of those criteria is a "lack of judicially discoverable and manageable standards for resolving it."[14] As to determining the size of districts, the standard is relatively easy—perfect equality between them in terms of legislators per voter is required. But, as this brief points out in Sections I and III, the weaknesses in

[14] 369 U.S. at 217.

the District Court's opinion show how difficult a standard is to come by on the multi-member, single-member district problem. And Mr. Justice Harlan, dissenting in *Reynolds* v. *Sims*, asserted: "No judicially manageable standard can determine whether a State should have single member districts or multi-member districts or some combination of both."[15]

Another criteria of a non-justiciable political question enunciated in *Baker* v. *Carr* is "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."[16] A brief look at the multi-member district versus single-member district problem demonstrates that it is clearly within this criterion and is therefore non-justiciable. Numerous arguments are made pro and con both types of districts. Many of these arguments are either rooted in a particular political philosophy or based on the visceral reactions of persons involved in the political process; relatively few can be said to be supported by solid empirical evidence.[17]

Among the arguments often advanced are:

1. Single-member districts make drawing boundaries more difficult, particularly in rapidly growing urban areas with shifting populations that may require frequent redistricting to conform to the one-mane, one-vote rule. And, following existing political boundary lines such as counties decreases the opportunities for gerrymandering to suit particular parties, philosophies or candidates.

2. Multi-member districts are criticized for encouraging large numbers of persons to run in primary elections with the result that voters may find it more difficult to make an

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[15] 377 U.S. 533, 621.

[16] 369 U.S. at 217.

[17] Probably the best effort in this regard is Malcolm Jewell's Metropolitan Representation; Legislative Districting in Urban Counties (National Municipal League—1969); yet by his own admission it is only a preliminary assessment of the ultimate effects of districting systems.

informed choice. At the same time, multi-member districts allegedly increase the influence of party organizations and other indorsing groups in primary elections.

3. Elections in single-member districts allegedly concentrate on the candidates; elections in multi-member districts concentrate on the broad issues rather than on candidates.

4. Single-member districts are alleged to increase the prospect for some representation of minority groups and divergent viewpoints. A distinct, but related, problem is which system most effectively represents the minority interests—such as black interests. While single-member districting may tend to create some largely-black districts, it also tends to create many more all-white districts which may have little or no sense of responsiveness to black districts' needs and which are capable of creating more intensive pressures on their representative on controversial issues such as open housing than may be true of an at-large member. It is argued with some persuasion that multi-member districts force the representatives to consider a larger variety of interests and opinions before voting. This gives them more ability to choose between competing interests which after all is at the heart of government and perhaps more freedom to vote their consciences rather than just voting the way of a single dominant interest. And legislators with broader interests would not be as likely to fragment approaches to statewide problems and programs on the basis of their very localized interests.

5. A legislator from a single-member district is allegedly more responsive to his constituents' needs and local interest groups whereas a legislator from a multi-member district is allegedly more likely to be broad issue oriented and responsive to political parties and less amenable to other pressure groups.

These arguments demonstrate that policy implications

are paramount in the multi-member, single-member districting problem. Among the policy considerations that can be discerned are: (1) Should the election of state legislators be centered on issues rather than candidates and personalities? (2) Should the legislators be local-issue oriented, or state-wide issue oriented? (3) Should development of political parties and political party responsibility be fostered? (4) Should legislators be subservient to pressure groups or should they be insulated as much as possible from the pressures of interest groups? (5) What is the best means of assuring effective representation to minority interests?

Thus the multi-member, single-member districting problem is clearly within this Court's established criteria for a non-justiciable political question. But the District Court proceeded in the face of this established doctrine and its opinion contains numerous examples of conscious choices between these competing policy considerations. Thus we see the court saying:

> The positions on political issues by the legislators elected from Marion County at large tend to coalesce, causing these legislators to maintain a common indifferentiated position. This effect is largely the result of election at large from a common constituency and obviates representation of a substantial, though minority, interest group within that common constituency.[18]

And,

> "The testimony shows that the county organizations of the two major political parties in Marion County, and particularly the County Chairmen, exert a very substantial influence over the nomination of General Assembly candidates. This pervasive influence would be substantially diminished by the use of specific single-member districts because the ability of candidates with sectional attractiveness to

[18] 305 F. Supp. at 1385.

> overcome the party's primary election recommendations would increase."[19]

And,

> "The testimony also shows the Marion County political organizations continue to exert considerable control over the actions of Marion County legislators after they are elected. This control results in part from the multi-member districting scheme."[20]

Furthermore, the District Court makes the implicit assumptions that programs appealing to the ghetto area will have a better chance of success with single-member districts and that a person must be a resident of a specific area and member of a special interest group in order to effectively represent it. These assumptions are highly speculative and dubious at best. They relate to questions of representational theory best left to the citizens of the State of Indiana.

This improper incursion by the District Court into a non-justiciable political question appropriate only to the people of Indiana and their elected representatives cannot be sanctioned, and the decision of the District Court should be reversed.[21]

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[19] *Ibid.*

[20] *Ibid.*

[21] Moreover, given the political nature of the problem, we respectfully refer this Court back to the discussion of Mr. Justice Brennan in *Baker* v. *Carr* concerning the "Guaranty Clause". See 369 U.S. at 208, *et seq.* Under Art. IV of the Constitution, each state is guaranteed a republican form of government. According to *Baker* v. *Carr*, under the guaranty clause legislative apportionment as an element of the republican form of government is a "political question" and non-justiciable whereas legislative apportionment as an element of equal protection is not a political question and is justiciable. We submit that the multi-member district versus single member district problem is essentially a political question and not a civil rights-equal protection problem which is justiciable. The guaranty clause and not the 14th Amendment controls the present case. Since there was no showing of a violation of the equal protection clause and since multi-member districting is certainly acceptable within a republican form of government, the District Court's decision should be reversed.

III. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE, NOR DOES IT PERMIT, DRAWING LEGISLATIVE DISTRICT LINES TO PROTECT COGNIZABLE RACIAL-SOCIO-ECONOMIC GROUPS AGAINST DILUTION OF THEIR VOTING STRENGTH

The District Court's decisions embody a separate but equal philosophy that this Court has specifically found repugnant to the Constitution.[22] Implicit in the July 28, 1969, decision is an instruction that districting should allocate the specified minority group a portion of the seats.

For example, the District Court says:

> The figures also show that the 1967 Ghetto Voting Area 'of the complaint was under-represented in the Senate (it had approximately half the Senators it should have had.)[23]' * * * The Negro Center Township Ghetto population is sufficient in size to elect approximately two members of the House of Representatives and approximately one Senator if these were specific single-member legislative districts within Marion County. (305 F. Supp. 1364 at 1385)

In its December 15, 1969 Order, the District Court was more explicit as to its belief that district lines should be drawn to maximize the voting strength of identifiable racial-socio-economic groups. It said:

> In districting Marion County, two of the plans submitted received primary consideration, the plan of the plaintiffs, and the plan of the intervening defendants. It is the opinion of the Court that the plaintiffs' plan for districting Marion County more nearly meets the constitutional standards laid down

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[22] See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[23] 1/4 the Senators and 1/3 the Representatives if the figures on page 1384 of 305 F. Supp. are used.

> by the Supreme Court as followed by this Court in its opinion of July 28, 1969. We note in the intervening defendants' plan large suburban areas are combined with parts of the Center Township ghetto area. In fact, in seven instances the intervening defendants' plan combines suburban areas with portions of the Center Township inner city. As we observed in our opinion of July 28, 1969, sophisticated gerrymandering has been soundly condemned. *Gomillion* v. *Lightfoot*. . . . *Plaintiff's plan also protects the legally cognizable racial minority group against dilution of its voting strength*. . . . (emphasis added) (A. 394, 395).

Of course, if the state legislature undertook to define the districts with racial considerations in mind, it would be subject to attack for violating the equal protection and due process clauses of the Fourteenth Amendment and the Fifteenth Amendment. See *Wright* v. *Rockefeller*, 211 F. Supp. 460 (S.D. N.Y. 1962), aff'd 376 U.S. 52; *Mann* v. *Davis*, 245 F. Supp. 241 (E.D. Va. 1965), aff'd sub. nom. *Burnette* v. *Davis*, 382 U.S. 42; *Sims* v. *Baggett*, 247 F. Supp. 96, 108-109 (M.D. Ala. 1965). In *Wright* the Court found that plaintiffs had failed to show that congressional lines were drawn on racial and national origin lines and so their complaint was dismissed. As Justice Douglas said while dissenting in *Wright* at pages 66, 67:

> Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the motion that District A must be represented by a Negro, as it is with the motion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. *Cf. Gray* v. *Sanders*, 372 U.S. 368, 379. The racial electoral register system weights votes along one

> racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines. * * *
>
> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; anatagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks railroad terminals, or any other facility serving the public.

And in *Mann* v. *Davis*, 245 F. Supp. 241 (E.D. Va. 1965), aff'd *sub. nom.* (*Burnette* v. *Davis*) 382 U.S. 42, the district court held that district lines could not be drawn with respect to preferring a race or color and that a multi-member districting scheme was not unconstitutional on the grounds that it deprived Negro citizens of a chance to elect one of their own race. Thus the court specifically held that the equal protection clause does not demand an alignment of districts for a state legislature to assure success at the polls of any race.

Concomitantly, to use district lines to separate blacks and whites was precisely the evil struck down in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

The District Court appears to recognize the problem but

tries to have its cake and eat it too. It says (305 F. Supp. at page 1394):

> In the performance of its tasks the General Assembly may wish to give consideration to certain principles of legislative apportionment brought out at the trial in these proceedings.
>
> In this regard, the Court in no way intends to intimate by this opinion that the Negroes residing in the Center Township Ghetto are entitled to a certain number of legislators. Legislative districts are to be drawn with an eye that is color blind; but the court notes that sophisticated gerrymandering has been soundly condemned. *Gomillion* v. *Lightfoot.*

Of course, as noted earlier, the District Court in ordering into effect a plan made its selection on the grounds that the selected plan protected "the legally cognizable racial minority group against dilution of its voting strength." Thus the Court itself relied on racial factors in drawing the lines—certainly sophisticated and unconstitutional gerrymandering at its worst.

The illogical nature of the District Court's reasoning is apparent from the dilemma it poses for the Indiana General Assembly. Since the multi-member scheme fell as contravening the equal protection clause because the "1967 Ghetto Voting Area" was underrepresented in the Senate, then the legislature would have to make sure that the single-member district lines were drawn to assure that the "1967 Ghetto Voting Area" would receive a pro-rata share of Senators lest it also fall short on equal protection grounds. But to comply with the District Court's reasoning, the legislature would have to proceed directly in contravention of well-established constitutional doctrine that race cannot be a factor in drawing district lines.

This dilemma results directly from trying to apply the equal protection doctrine to a question it is not well suited

to handle. Subtle discriminations can be perceived in single-member districts as well as in multi-member districts and the equal protection clause is inappropriate as the vehicle for a racial, religious or ethic group trying to advance its own interest at the expense of another such group. To allow the use of the equal protection clause in this context is to introduce the very distinctions between citizens that it so soundly condemns. Consequently, the District Court's decision should be reversed and not allowed to stand as a retreat to the separate but equal doctrine of *Plessy* v. *Ferguson*.[24]

CONCLUSION

For the above stated reasons, the amicus curiae respectfully urges this Court to reverse the District Court and hold that the Marion County multi-member districts do not contravene the equal protection clause.

Respectfully submitted

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[24] 163 U.S. 537.

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